

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0596

NIKOLAY A. SERBINOVICH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
GUNDERSON, INCORPORATED)	
)	DATE ISSUED: 06/12/2019
and)	
)	
LIBERTY NORTHWEST INSURANCE)	
CORPORATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Order Awarding Fees of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz and Genavee Stokes-Avery (Law Office of Charles Robinowitz), Portland, Oregon, for claimant.

John R. Dudrey (John R. Dudrey, LLC), Lake Oswego, Oregon, for employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Awarding Fees of Administrative Law Judge Steven B. Berlin (2013-LHC-01372) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the

challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *See Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

On February 28, 2014, the administrative law judge approved a settlement of claimant's claim pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). Claimant's counsel filed a petition in March 2014 for an attorney's fee for work performed before the Office of Administrative Law Judges. Employer filed objections to which claimant's counsel replied. In February 2016, the administrative law judge requested that the parties submit supplemental briefs addressing *Shirrod v. Director, OWCP*, 809 F.3d 1082, 49 BRBS 93(CRT) (9th Cir. 2015). Claimant's counsel filed a brief in March 2016 and a reply to employer's memorandum in April 2016. On June 15, 2018, counsel filed an amended fee petition to which employer filed a response. Ultimately, counsel requested a fee totaling \$14,822, representing 151.5 hours of attorney time at an hourly rate of \$520, 1.5 hours of associate attorney time at an hourly rate of \$285, and one-quarter hour of paralegal time at an hourly rate of \$170.

In his Order Awarding Fees, the administrative law judge found that counsel's 2016 proxy rate is \$350 and that his 2018 rate is \$379, based on the Oregon State Bar 2017 Economic Survey (2017 OSB Survey). He also awarded counsel the 2018 proxy rate of \$379 for services rendered in 2013 and 2014 to account for the delay in payment of the fee, but denied counsel a delay enhancement for services performed in 2016. The administrative law judge awarded the unopposed hourly rates of \$285 for counsel's associate and \$170 for his paralegal. The administrative law judge awarded an attorney's fee totaling \$12,066.60, payable by employer.¹

On appeal, claimant's counsel challenges the awarded hourly rates for his services and the denial of a delay enhancement for services rendered in 2016. Employer filed a response brief. Counsel filed a reply brief.

Claimant's counsel contends the administrative law judge did not provide a valid basis for rejecting the fee evidence he submitted in support of the requested hourly rate of \$520. Counsel avers the administrative law judge erred by adopting Administrative Law Judge Gee's evaluation in *Seachris v. Brady-Hamilton Stevedore Co.*, 2007-LHC-01747 (Jan. 19, 2017), *aff'd in part and modified in part*, BRB No. 17-0581 (May 7, 2018), of some of the fee evidence, which also was submitted in this case. He asserts that the administrative law judge's decision to place him in only the top quartile instead of the top

¹ The administrative law judge's award represents \$11,687.85 for counsel, \$337.50 for associate counsel, and \$41.25 for the paralegal.

five percent of all attorneys in Portland, Oregon has no basis and that his inclusion of general litigation rates in the calculation of the 2016 market rate fails to otherwise account for his significant experience specializing in Longshore claims. Counsel further contends the administrative law judge had no basis to reject the hourly rates of \$440 awarded by the United States Court of Appeals for the Ninth Circuit in 2017 and \$450 awarded by the Board in 2016.²

The Supreme Court of the United States has held that the lodestar method, in which the number of hours reasonably expended in preparing and litigating the case is multiplied by a reasonable hourly rate, presumptively represents a “reasonable attorney’s fee” under a federal fee-shifting statute, such as the Longshore Act. *See Perdue v. Kenny A.*, 559 U.S. 542 (2010); *City of Burlington v. Dague*, 505 U.S. 557 (1992); *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984). An attorney’s reasonable hourly rate is “to be calculated according to the prevailing market rates in the relevant community.” *Blum*, 465 U.S. at 895. The burden is on the fee applicant to produce satisfactory evidence that the requested hourly rates are in line with those prevailing in the relevant community for similar services by lawyers of comparable skill, experience and reputation. *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT); *Christensen v. Stevedoring Services of America*, 557 F.3d 1049, 43 BRBS 6(CRT) (9th Cir. 2009); *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009).

As this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the determination as to an appropriate hourly rate is guided by that court’s decision in *Shirrod*, which reiterated that, in awarding a fee under the Act, an administrative law judge must define the relevant community and consider market rate information tailored to that market. *Shirrod*, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). The Ninth Circuit held that when the relevant market is identified as Portland, as here, the results of the Oregon Bar Survey should be addressed when setting a proxy hourly rate, as it provides information on attorney’s fees specific to Portland. *Id.*

We reject counsel’s contentions with respect to the awarded 2016 proxy hourly rate of \$350. The administrative law judge provided a thorough analysis under applicable law of the market rate evidence offered by counsel and set forth a rational basis for his market rate determination based on data from the 2017 OSB Survey submitted by counsel. *See*

² Claimant’s counsel submitted the fee awards in *Knutson Towboat Co. v. Wakeley*, No. 14-70990 (9th Cir. Aug. 22, 2017) and *Seachris v. Brady Hamilton Stevedore Co.*, BRB No. 11-0104 (Oct. 17, 2016) (unpub.).

Shirrod, 809 F.3d at 1089, 49 BRBS at 96-97(CRT). The administrative law judge addressed and rationally rejected the other evidence submitted by counsel in support of his requested hourly rate of \$520, and counsel has not established an abuse of the administrative law judge's discretion in this regard.³ Order Awarding Fees at 3-6; *see Christensen v. Stevedoring Services of America*, 44 BRBS 39 (2010), *modifying in part on recon.* 43 BRBS 145 (2009), *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F. App'x 912 (9th Cir. 2011). He then permissibly relied on the 2017 OSB Survey to determine that a \$350 hourly rate represents a reasonable weighted average of the rates in the two practice areas he found most relevant, and, therefore, was not required to afford counsel an opportunity to submit additional evidence.⁴ *See Shirrod*, 809 F.3d at 1092, 49 BRBS at 98-99(CRT); *Christensen*, 557 F.3d at 1055, 43BRBS at 9(CRT). Claimant's counsel has failed to establish he abused his discretion. *See generally Fox v. Vice*, 563 U.S. 826, 45 BRBS 41(CRT) (2011); *Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67(CRT) (9th Cir. 1996). We therefore affirm the administrative law judge's findings that the 2016 proxy market rate for counsel is \$350 per hour and that the 2018 proxy rate, adjusted for inflation, is \$379.

³ The administrative law judge addressed each of counsel's exhibits that were not addressed by Administrative Law Judge Gee in *Seachris* and provided a specific rationale for their acceptance or rejection. He permissibly rejected survey data based on years of experience as not specific to attorneys with similar skills, and did not abuse his discretion in rejecting the hourly rates awarded for appellate work. *Shirrod*, 809 F.3d 1082, 49 BRBS 93(CRT). Moreover, he acted within his discretion in incorporating Judge Gee's rejection of counsel's other exhibits. *See Carter v. Caleb Brett, LLC*, 757 F.3d 866, 869, 48 BRBS 21, 22(CRT) (9th Cir. 2014); *Christensen*, 557 F.3d at 1055, 43 BRBS at 9(CRT) (a new hourly rate determination need not be made in every case so long as the issue is visited with sufficient regularity to ensure that rates are market-based).

⁴ The administrative law judge permissibly relied on the weighted averages in the 75th percentile of documented rates in the 2017 OSB Survey for plaintiff civil litigation/personal injury and plaintiff civil litigation cases in Portland, Oregon, to calculate a proxy market rate for counsel's services in this case. Order Awarding Fees at 5-6. *See Nelson v. ICTSI Oregon, Inc.*, 743 F. App'x 120 (9th Cir. 2018), *aff'g* BRB No. 16-0517 (Aug. 18, 2017) (unpub.) (no abuse of discretion in the administrative law judge's use of the 2012 OSB Survey data solely from the practice area of civil litigation/plaintiff personal injury to calculate counsel's hourly rate and the placement of counsel at the 75th percentile rate); *see also Hardman v. Marine Terminals Corp.*, 758 F. App'x 586 (9th Cir. 2018), *aff'g* BRB No. 17-0097 (Oct. 18, 2017) (unpub.).

Counsel also contends the administrative law judge erred by not enhancing his 2016 hourly rate for delay, as approximately 28 months elapsed from the time services were last rendered on April 8, 2016, and issuance of the administrative law judge's fee award on August 2, 2018. Counsel avers this is a sufficiently lengthy period to warrant a fee enhancement for delay.

The issue of a delay enhancement concerns the lapse in time between when the legal services were performed and the award of a fee for those services. *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Anderson*, 91 F.3d 1322, 30 BRBS 67(CRT). The administrative law judge found that the delay in payment for services rendered in 2013 and 2014 warranted an award based on 2018 rates, but that delay from 2016 to 2018 is merely ordinary delay that is not a basis for enhancement. Order Awarding Fees at 7. Counsel has not shown the administrative law judge's decision on this matter to be arbitrary, capricious, based on an abuse of discretion, or not in accordance with law. *Christensen*, 557 F.3d 1049, 43 BRBS 6(CRT) (affirming Board's finding that two years' delay was "ordinary" and did not require delay enhancement); *see also Hardman v. Marine Terminals Corp.*, 758 F. App'x 586, 588 (9th Cir. 2018) (declining to seek en banc review sua sponte of *Christensen* holding). Consequently, we affirm the administrative law judge's hourly rate awards.

Accordingly, we affirm the administrative law judge's Order Awarding Fees.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge